JUL 25 2013

No. 09-1567

IN THE

Supreme Court of the United States

JAMES D. LEE,

Petitioner,

v.

ASTORIA GENERATING COMPANY, L.P., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

BRIEF IN OPPOSITION FOR RESPONDENTS ASTORIA GENERATING COMPANY, L.P., ORION POWER NEW YORK GP, INC., ORION POWER NEW YORK, L.P., AND ORION POWER NEW YORK LP, LLC

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. Has Petitioner presented compelling reasons to grant the Petition, where the determination of the New York Court of Appeals is a fact-specific application of the definition of "vessel" set forth by this Court in *Stewart v. Dutra Construction Co.*?

II. Has Petitioner presented compelling reasons to grant the Petition, where the Record before the New York State courts would provide no guidance to this Court in resolving a purported conflict among the Fifth, Seventh and Eleventh Circuits as to whether indefinitely-moored riverboat casinos are "vessels" under *Stewart*?

III. Has Petitioner presented compelling reasons to grant the Petition, where the state court determination that strict and vicarious liability claims against a vessel owner are preempted by the federal Longshore and Harbor Workers' Compensation Act (LHWCA) (33 U.S.C. § 901 *et seq.*) is consistent with established law, and avoids the issue of whether the general maritime law impliedly preempts New York Labor Law §§ 240(1) and 241(6) in all cases involving accidents to construction workers on navigable waters?

IV. Has Petitioner presented compelling reasons to grant the Petition, where the New York State courts have already dismissed his cause of action for common-law negligence based on the same state law standards pursuant to which he seeks to assert a negligence claim under 33 U.S.C. § 905(b)?

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Orion Power New York, L.P. ("OPNY"), a Delaware limited partnership, is an indirect, wholly-owned subsidiary of RRI Energy, Inc. (formerly knows as "Reliant Energy, Inc.") OPNY's general partner is Orion Power New York GP, Inc., a Delaware corporation ("OPNYG"), and its limited partner is Orion Power New York LP, LLC, a Delaware limited liability company ("OPNYL"). OPNYG owns a 0.2% general partnership interest and OPNYL owns a 99.8% limited partnership interest in OPNY. OPNYG and OPNYL are each direct, wholly-owned subsidiaries of Orion Power Holdings, Inc., a Delaware corporation. That entity is a direct, wholly-owned subsidiary of RRI Energy, Inc., a Delaware corporation.

Astoria Generating Company, L.P. ("Astoria") was an indirect, wholly-owned subsidiary of RRI Energy, Inc., until February 23, 2006, when it was sold to Astoria Generating Company Acquisitions, L.L.C. At the time of the sale, OPNYG was Astoria's general partner and OPNY was its limited partner. OPNYG owned a 1% general partnership interest in Astoria and OPNY owned a 99% limited partnership interest.

RRI Energy, Inc.'s other subsidiaries are listed below. Each is wholly-owned by RRI Energy, Inc., either directly or indirectly unless otherwise noted.

Conemaugh Fuels, LLC[1]

Keystone Fuels, LLC[2]

Orion Power Midwest GP, Inc.

Orion Power Midwest LP, LLC

Orion Power Midwest, L.P.

Orion Power Operating Services MidWest, Inc.

RRI Energy Asset Management, LLC

RRI Energy Broadband, Inc.

RRI Energy California Holdings, LLC

RRI Energy Channelview (Delaware) LLC

RRI Energy Channelview (Texas) LLC

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1. RRI Energy Key/Con Fuels, LLC, a Delaware limited liability company and an indirect, wholly owned subsidiary of RRI Energy, Inc., owns a 16.45% membership interest in Conemaugh Fuels, LLC. There are seven other non-Reliant members that individually hold varying percentages of the remainder of Conemaugh Fuels, LLC's, membership interests.

2. Reliant Energy Key/Con Fuels, LLC, a Delaware limited liability company and an indirect, wholly owned subsidiary of Reliant Energy, Inc., owns a 16.67% membership interest in Keystone Fuels, LLC. There are six other non-Reliant members that individually hold varying percentages of the remainder of Keystone Fuels, LLC's membership interests.

RRI Energy Channelview LP

RRI Energy Communications, Inc.

RRI Energy Corporate Services, LLC

Reliant Energy Florida, LLC

RRI Energy Key/Con Fuels, LLC

RRI Energy Mid-Atlantic Power Holdings, LLC

RRI Energy Mid-Atlantic Power Services, Inc.

RRI Energy Northeast Generation, Inc.

RRI Energy Northeast Holdings, Inc.

RRI Energy Northeast Management Company

RRI Energy West, Inc.

RRI Energy Power Generation, Inc.

RRI Energy Sabine (Delaware), Inc.

RRI Energy Sabine (Texas), Inc.

RRI Energy Services Channelview LLC

Reliant Energy Services Desert Basin, LLC

RRI Energy Services, Inc.

RRI Energy Solutions East, LLC

RRI Energy Trading Exchange, Inc.

RRI Energy Ventures, Inc.

RRI Energy Wholesale Generation, LLC

Sabine Cogen, LP

San Gabriel Power Generation, LLC

RRI Energy, Inc., does not have any affiliates, as neither it nor any of its subsidiaries owns 10% or more of the issued and outstanding equity of any entity other than those listed above.

RRI Energy, Inc., is the sole member of the three Texas non profit corporations listed below. These entities are not considered subsidiaries or affiliates, however, because they do not issue stock or declare dividends:

RRI Energy Foundation

RRI Energy, Inc. Political Action Committee

RRI Energy, Inc. Texas Political Action Committee

TABLE OF CONTENTS

	Page
COUNTER-STATEMENT OF QUESTIONS PRESENTED	i
RULE 29.6 CORPORATE DISCLOSURE STATEMENT	iii
TABLE OF CONTENTS	vii
TABLE OF CITED AUTHORITIES	x
INTRODUCTION	1
STATEMENT OF THE CASE	3
A. Factual Background	3
The Gowanus Barges	3
The Underlying Accident	5
Petitioner Claimed That He Was A "Maritime Worker" Under The LHWCA	6
B. Proceedings Below	7
The Summary Judgment Motions	8
Petitioner's Opposition To The Motions	9

Contents

Page

The Reply 9

The Motion Court's Decision 10

The Appellate Division Decision 11

The New York Court Of Appeals Decision .. 13

REASONS FOR DENYING THE PETITION ... 14

I. THE CASE INVOLVES A FACT-SPECIFIC APPLICATION OF THE *STEWART* DEFINITION 14

II. CERTIORARI SHOULD NOT BE GRANTED HERE TO RESOLVE A PURPORTED CONFLICT IN THE CIRCUITS AS TO THE VESSEL STATUS OF RIVERBOAT CASINOS .. 19

III. SINCE THE PETITIONER'S CLAIM IS CLEARLY SUBJECT TO MARITIME JURISDICTION, THE NEW YORK COURT OF APPEALS CORRECTLY DETERMINED THAT PETITIONER'S STRICT AND VICARIOUS LIABILITY CLAIMS AGAINST ASTORIA/ORION WERE PREEMPTED 22

Page

The Claim Satisfies The "Situs" And "Status" Tests For Maritime Jurisdiction 22

The Court Of Appeals Properly Determined That Petitioner's Strict And Vicarious Liability Claims Against Astoria/Orion Were Preempted 24

IV. PETITIONER'S NEGLIGENCE CLAIM WAS DISMISSED ON STATE LAW GROUNDS, AND THE RECORD PROVIDES NO BASIS FOR FINDING A BREACH OF THE *"SCINDIA"* DUTIES 27

CONCLUSION 29

TABLE OF CITED AUTHORITIES

CASES

Page

Alderman v. Pacific Northern Victor, Inc.,
95 F.3d 1061 (11th Cir. 1996) 23

Anaya v. Traylor Brothers, Inc.,
478 F.3d 251 (5th Cir. 2007) 23

Anderson v. United States,
317 F.3d 1235 (11th Cir. 2003) 23

Board of Commissioners of the Orleans Levee District v. M.V. Belle of Orleans,
535 F.3d 1299 (11th Cir. 2008) ..... *passim*

Bunch v. Canton Marine Towing Co.,
419 F.3d 868 (8th Cir. 2005) 16

Calcaterra v. City of N.Y.,
45 A.D.3d 270 (N.Y. App. Div. 2007) 16

Cammon v. City of New York,
95 N.Y.2d 583 (2000), *rearg. denied*
96 N.Y.2d 793 (2001) 13, 24, 27

Caserma v. Consolidated Edison Co.,
BRB No. 97-0770 (March 6, 1998), 32 BRBS
25 (1998) 7

Consolidated Edison Co. v. City of New York,
44 N.Y.2d 536 (1978) 4

Cited Authorities

Page

Cope v. Vallette Dry-Dock Co.,
119 U.S. 625 (1887) 18

De La Rosa v. St. Charles Gaming Co., Inc.,
474 F.3d 185 (5th Cir. 2006) 17, 19, 20

Director, OWCP v. Perini North River Associates,
459 U.S. 297 (1983) 7, 24

Emanuel v. Sheridan Transp. Corp.,
10 A.D.3d 46 (N.Y. App. Div. 2004) 24-25, 28

Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co.,
271 U.S.19 (1926) 18

Holmes v. Atl. Sounding Co.,
437 F.3d 441 (5th Cir. 2006) 16

Howard v. S. Ill. Riverboat Casino Cruises, Inc.,
364 F.3d 854 (7th Cir. 2004), *cert. denied*,
543 U.S. 942 (2004) 17, 19

Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.,
513 U.S. 527 (1995) 23

Kathriner v. UNISEA, Inc.,
975 F.2d 657 (9th Cir. 1992) 18

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Page

Lee v. Elliott Turbomachinery,
BRB No. 02-0761 (July 23, 2003)
(unpublished decision) 5

McLaurin v. Noble Drilling (US) Inc.,
529 F.3d 285 (5th Cir. 2008) 22

Norfolk Shipbuilding & Drydock Corp. v. Garris,
532 U.S. 811 (2001) 26

Pavone v. Mississippi Riverboat Amusement Corp.,
52 F.3d 560 (5th Cir. 1995) 11-12, 17

Rigopoulos v. State of N.Y.,
236 A.D.2d 459 (N.Y. App. Div. 1997) 25

Roper v. United States,
368 U.S. 20 (1961) 17

Scindia Steam Nav. Co. v. De Los Santos,
451 U.S. 156 (1981) 25, 27, 28

Scott v. Trump Indiana, Inc.,
337 F.3d 939 (7th Cir. 2003) 23

Stewart v. Dutra Construction Co.,
543 U.S. 481 (2005) ..... *passim*

Cited Authorities

Page

Sutherland v. City of N.Y.,
266 A.D.2d 373 (N.Y. App. Div. 1999) 25

Tagliere v. Harrah's Illinois Corp.,
445 F.3d 1012 (7th Cir. 2006) 16

Tibak v. City of New York,
154 A.D.2d 313 (N.Y. App. Div. 1989),
lv. denied, 75 N.Y.2d 705 25

Tompkins v. Port of New York Authority,
217 A.D.2d 269 (N.Y. App. Div. 1996) 25

Uzdavines v. Weeks Marine, Inc.,
418 F.3d 138 (2nd Cir. 2005) 16

West v. United States,
361 U.S. 118 (1959) 17

STATUTES

1 U.S.C. § 3 ..... 1, 15

33 U.S.C. § 901 i

33 U.S.C. § 902(3) 7, 23

33 U.S.C. § 905(b) ..... *passim*

46 U.S.C. § 763(a) 6

Cited Authorities

Page

46 U.S.C. § 30104(a) 2

New York Labor Law § 200 ..... 7, 12, 27

New York Labor Law § 240(1) ..... *passim*

New York Labor Law § 241(6) ..... *passim*

INTRODUCTION

In *Stewart v. Dutra Construction Co.* (543 U.S. 481 [2005]), this Court held that, for purposes of the LHWCA, the term "vessel" includes "every description of water-craft or other artificial contrivance used, or capable of being used, as a means of transportation on water" (*id.*; *see also* 1 U.S.C. § 3). Applying that definition, the New York Court of Appeals properly held that the barge, Gowanus Bay No. 1, where Petitioner was working at the time of his alleged injury, is a vessel, and that accordingly, § 905(b) of the LHWCA preempts state law claims that would otherwise impose strict and vicarious liability on the vessel owner.

The determination of the Court of Appeals does not conflict with a decision of this or any other court, but even if it did so, certiorari would not be warranted. The conclusion that Gowanus Bay No. 1 is a vessel represents a fact-specific application of the *Stewart* criteria. As such, it does not present any compelling reasons for review by this Court. As stated in this Court's Rule 10, certiorari "is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

There is likewise no merit to Petitioner's further argument that to grant certiorari in this case would somehow assist the Court in resolving an apparent conflict among the Fifth, Seventh and Eleventh Circuits concerning the application of the *Stewart* criteria to indefinitely moored riverboat casinos. Assuming that such a conflict exists, the Record in this case contains

no facts that would enable this Court to resolve it. These cases typically raise the issue of whether casino staff such as waiters and bartenders are "seamen" on a "vessel in navigation" for purposes of the Jones Act (46 U.S.C. § 30104[a]), and as such, are entirely dissimilar from the instant case, which does not present the issue of whether Gowanus Bay No. 1 was a vessel "in navigation."

Nor does the determination by the Court of Appeals that Petitioner's state law strict and vicarious liability claims were preempted by the LHWCA provide a compelling reason for granting certiorari. Petitioner's contention that even if the barge is a "vessel," he could assert such claims under the "maritime but local" rule is without merit. The case satisfies the "situs" requirement for maritime jurisdiction, inasmuch as it is uncontested that Petitioner was working on navigable waters when he was allegedly injured. The "status" requirement is likewise satisfied, since Petitioner was engaged in a traditional maritime activity—repair of a turbine on a vessel—when he was allegedly injured. Moreover, since the Court of Appeals relied on 33 U.S.C. § 905(b) in holding that Petitioner's state law claims were preempted, the case does not raise the broader issue of whether the general maritime law impliedly preempts strict and vicarious liability claims by construction workers injured on navigable waters, and accordingly certiorari should not be granted to address that issue.

Finally, Petitioner's negligence argument must be rejected since the New York State Courts have already dismissed his cause of action for common-law negligence

based on the same state law standards on which he seeks to base a claim for vessel negligence under 33 U.S.C. § 905(b).

STATEMENT OF THE CASE

A. Factual Background

The Gowanus Barges

The Gowanus Power Generating Facility, in Upper New York Bay, is a floating gas and oil turbine power generating station. In April 2001, when Petitioner alleges that he was injured, it was owned and operated by Astoria Generating Company, L.P., Orion Power New York, G.P., Inc., Orion Power New York, L.P., and Orion Power New York LP, LLC ("Astoria/Orion"). This facility, originally owned by Consolidated Edison Company ("Con Ed"), consists of four barges, each with eight turbine units. Gowanus Bay No. 1, the barge where Petitioner was working, is a steel vessel of 1,829 gross tons. It is approximately 215 feet long and 80 feet wide, with a hull depth of eleven feet. The turbines on the barge are approximately ten feet wide and 50 feet long and are encased in rectangular exhaust wells made of half-inch metal plates. At the top of each well is an opening called a "stack hatch" or a "sniffer," some 15 feet above the catwalk surrounding the turbine.

In a 1978 case concerning the tax status of the power plant, the New York Court of Appeals explained that:

> Each barge is connected to the pier by a "spud and clamp" design system which allows for

> vertical movement with tidal variations and for linear movement with the wind, waves, and the wash from passing vessels. Each has two clamps that fit two spuds (designed as an H-shaped beam and connected to the mooring by bolts) in such manner as to be capable of movement along the H-shaped beam. Con Ed's claim is uncontroverted that all connections can be severed and the barge can put to sea, if desired, in 8 to 12 hours.

(*Consolidated Edison Co. v. City of New York*, 44 N.Y.2d 536, 539 [1978]).

The barges rise and fall with the tides, and although they rock back and forth during high winds, they are designed to withstand 100 miles plus per hour hurricane force winds. The barges have multiple telephone lines and "start lines" that allow Con Ed to start the units by remote control when it buys power generated at the Gowanus facility. Contrary to Petitioner's contention that they are "permanently moored," the barges are not permanently fixed to the bottom of the bay or to the shore, but can be disconnected and moved to dry dock for maintenance. This is done "between every eight and ten years, or on an as-needed basis." Additionally, the barges can, and have, been moved to other locations to supply electricity where needed. In 1996, for example, when a boiler in Astoria, New York exploded, two of the barges were moved there for about three months. Since then, the barges have remained at their present location in large part because demand in the area for the power provided by the barges has remained strong. The barges can and probably would be moved from their present

location if a worthwhile opportunity arose. The barges, which are registered as vessels with the Coast Guard, are accessible only by gangplanks, and contain Coast Guard mandated life-saving equipment (life rings).

The turbines on the barges undergo routine maintenance, described as "a major overhaul," every 10,000 service hours. In 2001, Third-Party Defendants-Respondents Elliott Turbomachinery Co., Inc. and Elliott Company ("Elliott") contracted with Astoria/Orion to perform such maintenance.

The Underlying Accident

Petitioner, who worked for Elliott as a millwright, was injured on April 16, 2001, while working on turbine 2 on Gowanus Bay No. 1. He claims that he aggravated a pre-existing back condition when he fell while attempting to reach the turbine by climbing down through the stack hatch at the top of the exhaust well surrounding it. Ordinarily workers gain access to the turbines through holes cut in the side of the exhaust well that are later re-welded shut. Such a hole had been welded shut on turbine 2 the day before Petitioner's accident.

Petitioner sought and received compensation under the LHWCA in 2003 (*see Lee v. Elliott Turbomachinery*, BRB No. 02-0761 [July 23, 2003] [unpublished decision]). That same year, he commenced this action against Astoria/Orion, alleging that it violated §§ 200, 240(1) and 241(6) of the New York State Labor Law. He did not assert a negligence claim under § 905(b) of the LHWCA, and the time to do so pursuant to the three year statute

of limitations applicable to maritime torts (46 U.S.C. § 763[a]) has since expired. Astoria/Orion, in turn, brought a third-party action seeking indemnification from Elliott.

Petitioner Claimed That He Was A "Maritime Worker" Under The LHWCA

At his hearing before the United States Department of Labor ("Department of Labor"), to support his claim that he was a maritime worker for purposes of obtaining compensation under the federal LHWCA, Petitioner argued that the work in which he was engaged was not "land-based," and that his presence on the barge was not "fortuitous" or "transient." Petitioner further argued:

> Working on the barges, he was subjected to a certain element of danger which comes with working on the water. He's got to climb, he's got to carry heavy equipment and the barge rocks and moves with the wind and the tide. That is exactly why we have the [LHWCA].

The parties stipulated that the Gowanus Bay was a navigable waterway. At the Department of Labor hearing, Petitioner's counsel produced a United States Coast Guard vessel information sheet that "refer[red] to a vessel Gowanus Bay No. 1," the barge on which Petitioner was injured, and provided a Coast Guard vessel identification number for the barge. A witness for Astoria/Orion testified that the barge could be moved to supply emergency power if it were economically feasible.

In affirming the decision for Petitioner, the BRB relied in part on its decision in *Caserma v. Consolidated Edison Co.* (BRB No. 97-0770 [March 6, 1998], 32 BRBS 25 [1998]), which held that the barges are floating structures not permanently affixed to land, and that a mechanic who was injured while working on one of the barges at the Gowanus facility satisfied the "situs and status" requirements of the LHWCA, under the standard articulated in *Director, OWCP v. Perini North River Associates* (459 U.S. 297 [1983]). The BRB reasoned that pursuant to *Perini*, when a worker is injured on actual navigable waters in the course of employment on those waters, he or she is a maritime employee under the LHWCA. The LHWCA defines "employee" as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker" (33 U.S.C. § 902[3]).

B. Proceedings Below

Notwithstanding his receipt of benefits under the LHWCA, and the availability of a claim for active negligence against a vessel owner under the LHWCA, Petitioner commenced a state court tort action against Astoria/Orion, alleging that it had violated New York State Labor Law §§ 200, 240(1) and 241(6).[3] Astoria/Orion

3. Section 200 of the Labor Law codifies the common-law duty to provide a safe place to work. Section 240(1), sometimes referred to as the "Scaffold Law," imposes strict liability on owners and general contractors for injuries to construction

(Cont'd)

commenced a third-party action against Elliott claiming common law as well as contractual indemnification rights. Although he had successfully argued before the Department of Labor that his work was not "land-based," in order to recover under state law, Petitioner took the opposite position and contended that maritime law did not apply.

The Summary Judgment Motions

Elliott and Astoria/Orion moved for summary judgment dismissing the complaint and third-party action, arguing that: (1) a "vessel" cannot seek indemnification under the LHWCA; (2) as Petitioner's employer, Elliott was immune from liability under the New York State Workers' Compensation Law; and (3) Petitioner's Labor Law § 240(1) and § 241(6) claims were expressly preempted by 33 U.S.C. § 905(b). Elliott and

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(Cont'd)

workers resulting from elevation-related risks. Section 241(6), in turn, imposes a non-delegable duty on owners and contractors to provide reasonable and adequate protection and safety to workers engaged in construction, excavation, or demolition work. As such, §§ 240(1) and 241(6) closely resemble the "warranty of seaworthiness" which formerly imposed strict liability upon shipowners for injuries to longshore and harbor workers. The warranty of seaworthiness was abolished by amendments to the LHWCA enacted in 1972, including 33 U.S.C. § 905(b). Section 905(b) provides that a covered employee may bring an action for the negligence of a vessel, and that "[t]he remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this Act." In contrast to the strict liability provisions of Labor Law § 240(1), comparative negligence is a defense to an action under § 905(b).

Astoria/Orion also argued that the court need not reach the issue of preemption with respect to the § 241(6) claim, since Petitioner was not engaged in construction, excavation or demolition work, so that § 241(6) would be inapplicable in any event; and that § 240(1) was inapplicable because Petitioner's decision to climb down the hatch without a ladder was the "sole proximate cause" of his alleged injury. With respect to the Labor Law § 200 claim, Elliott and Astoria/Orion argued that it was undisputed that Petitioner received no instruction or supervision from anyone other than employees of Elliott; that Astoria/Orion played no supervisory role in the work done by Elliott's employees; and that there was no evidence of negligence on Astoria/Orion's part, thereby precluding a claim under Labor Law § 200.

Petitioner's Opposition To The Motions

In opposition, Petitioner contended that state law was not preempted by the LHWCA, since the barge was not a vessel in navigation; work being done near navigable waters does not create admiralty jurisdiction; and Petitioner's receipt of LHWCA benefits did not preclude his claims against a non-vessel property owner. In addition, Petitioner argued that state law could be imported into federal admiralty law under the "maritime but local" rule.

The Reply

In reply, Elliott argued that Gowanus Bay No. 1 satisfied the *Stewart* definition of "vessel," since it was not permanently moored and was capable of being used

to transport its generators over water; and that maritime jurisdiction was appropriate because the accident occurred on navigable waters and Petitioner was engaged in maritime activity.

The Motion Court's Decision

The Supreme Court, New York County ("motion court") dismissed the complaint and third-party complaint, holding that the barge was a "vessel" under this Court's decision in *Stewart*, and that the Labor Law §§ 240(1) and 241(6) claims were preempted by 33 U.S.C. § 905(b) (Pet. App. 83a-84a). The court held, "upon a plain reading of the statute and case law, it is apparent to the Court that § 905(b) expressly preempts all causes of action against a vessel owner except those brought pursuant to § 905(b) in negligence" (Pet. App. 80a).

Of particular importance to the motion court were the 1972 amendments to the LHWCA, which eliminated the warranty of seaworthiness. The court determined that inasmuch as Labor Law § 240(1) is a strict liability statute, it conflicts with the LHWCA. The court further held that § 241(6) was similarly preempted, concluding that "applying the Labor Law to the instant case would place strict liability for the safety [*sic*] on the vessel owner, Astoria/Orion, rather than on the employer, Elliott, in direct contradiction to the intent of Congress" (Pet. App. 83a).

Finally, the court dismissed the claim pursuant to Labor Law § 200, which codifies the common-law duty imposed on an owner or general contractor to provide

construction workers with a safe work site. The court reasoned as follows:

> The record clearly demonstrates that Astoria/Orion did not exercise any supervision or control of the methods or materials of Plaintiff's work. The record indicates that Plaintiff only received instruction from Elliott's personnel.
>
> The Court also notes that the Complaint also fails to assert a cause of action for negligence against Astoria/Orion pursuant to section 905(b), or that said defendant violated any of the duties imposed upon vessel owners, such as the turnover duty, the active control duty, or the duty to warn. Finally, Plaintiff's "maritime but local" argument is insufficient. Having failed to allege a claim of negligence in accordance with the LHWCA, and upon dismissal of Plaintiff's Labor Law claims, the Plaintiff's complaint is dismissed in its entirety (Pet. App. 84a).

The Appellate Division Decision

Petitioner appealed, and a majority at the Appellate Division of the Supreme Court held that Gowanus Bay No. 1 was not a vessel (Pet. App. 30a), and that, accordingly, Petitioner's Labor Law §§ 240(1) and 241(6) claims were not precluded by the LHWCA (Pet. App. 32a). The majority relied primarily upon *Pavone v. Mississippi Riverboat Amusement Corp.* (52 F.3d 560

[5th Cir. 1995]), which held that two employees injured on the *Biloxi Belle*, a "floating dockside casino," were not covered by the Jones Act or maritime law.

Alternatively, the majority held that even if the barge were a vessel, federal maritime jurisdiction would not preempt the state Labor Law claims (Pet. App. 36a), on the theory that the tort was "maritime but local" (Pet. App. 37a-38a). After searching the record, the court also granted Petitioner partial summary judgment on liability under § 240(1), even though Petitioner had not requested such relief (Pet. App. 32a). The court, however, affirmed the dismissal of the Labor Law § 200 claim, holding that the motion court was "correct" in finding that Astoria/Orion did not have the supervisory control over the injury-producing activity necessary to support a finding of liability for common-law negligence or under Labor Law § 200 (Pet. App. 35a).

One justice dissented, arguing that the Gowanus barges were indeed vessels under *Stewart*, and that this Court in *Stewart* had previously recognized that § 905(b) "expressly preempts causes of action against a vessel owner on grounds other than negligence," such as the strict liability claims asserted by Petitioner against Astoria/Orion (Pet. App. 39a). The dissent concluded that as there was no evidence that the Petitioner's injuries were caused by any negligent conduct on the part of Astoria/Orion, the imposition of vicarious liability "poses a stark conflict with the exclusivity provision of 33 U.S.C. § 905(b)," and is foreclosed by the LHWCA (Pet. App. 44a).

The New York Court Of Appeals Decision

Astoria/Orion and Elliott appealed with the permission of the Appellate Division, and the New York Court of Appeals, in a 5-2 decision, reversed the order of the Appellate Division and reinstated the motion court's order (Pet. App. 10a), holding that the barge was a "vessel" for purposes of the LHWCA and that the Labor Law §§ 240(1) and 241(6) claims were preempted by the LHWCA. The Court reasoned that the LHWCA specifically permits an injured person covered under the LHWCA to bring an action in negligence against a vessel but also provides that this is to be exclusive of all other remedies against the vessel except remedies available under the Act (Pet. App. 7a). The court relied extensively upon *Stewart* in determining that Gowanus Bay No. 1 was, in fact, a "vessel," noting that this Court had provided "detailed guidance concerning the definition and characteristics of a vessel" (Pet. App. 7a).

In addition, the Court of Appeals addressed its prior decision in *Cammon v. City of New York* (95 N.Y.2d 583 [2000], *reargument denied* 96 N.Y.2d 793 [2001]), upon which the majority at the Appellate Division had relied in holding that even if the barge were a vessel, the state Labor Law claims would not be preempted. The court stated that *Cammon* "does not support the premise that New York's Labor Law is not preempted by section 905(b)" (Pet. App. 9a), pointing out that unlike this case, *Cammon* did not involve § 905(b) or a vessel owner (Pet. App. 9a). Rather, *Cammon* involved a defendant *landowner* and an injured worker who received benefits under the LHWCA. The Court of Appeals in *Cammon* concluded that, under the particular circumstances of

that case, where the plaintiff was engaged in a "local, land-based repair" (repairing the fendering system of a city-owned pier), federal maritime law did not preempt strict liability claims under Labor Law § 240(1).

The two dissenting judges agreed that the Gowanus barge was a "vessel," but concluded that § 905(b) of the LHWCA did not preempt the state law claims (Pet. App. 11a) since, in their opinion, the Petitioner's tort claim did not satisfy the "status" test for a maritime tort (Pet. App. 16a).

REASONS FOR DENYING THE PETITION

I. THE CASE INVOLVES A FACT-SPECIFIC APPLICATION OF THE *STEWART* DEFINITION

The New York Court of Appeals held, as a matter of law, that Gowanus Bay No. 1, located on navigable waters in the Gowanus Bay, is a vessel within the LHWCA. This represents a fact-specific and appropriate application of the *Stewart* definition, and provides no compelling reason for granting certiorari. Significantly, under *Stewart*, it is a watercraft's *potential*, rather than its *actual*, use that is dispositive: "Section 3 requires only that a watercraft be 'used, or capable of being used, as a means of transportation on water' to qualify as a vessel. It does not require that a watercraft be used *primarily* for that purpose" (543 U.S. at 495).

Here, the Gowanus barges not only have the potential ability to be used as a means of transporting their electrical power generating turbines over water,

but two of them have actually been used for that purpose. Other indicia of vessel status include the fact that the barges were built in a shipyard; they can be used to provide emergency power to shoreside locations, which serves a maritime purpose; they are accessible only by gangplanks; they are registered with the United States Coast Guard as vessels; and they contain safety equipment (life-saving rings) required by the Coast Guard. Unlike the dockside casino structure in *Pavone*, they are not permanently connected to any land-based structures.

The vessel in *Stewart* actually resembled the Gowanus barges in many respects. It was a dredge with "only limited means of self-propulsion" that required a tugboat to move any "appreciable distance" (543 U.S. at 484). In determining whether the dredge was a "vessel," this Court found that it was the watercraft's *potential*, rather than its *actual* use, that determined its status: "section 3 [1 U.S.C. § 3] requires only that a watercraft be 'used, or capable of being used, as a means of transportation on water' to qualify as a vessel. It does not require that a watercraft be used primarily for that purpose" (*id.* at 495). This Court further stated, "[u]nder § 3, a 'vessel' is any watercraft practically capable of maritime transportation, regardless of its primary purpose or state of transit at a particular moment" (*id.* at 497). This Court did not, as Petitioner suggests, hold that an owner's intent be considered (Pet. 18). The Court clearly defined "vessel" and this case offers no reason to revisit that definition.

Petitioner ignores the applicable definition of a "vessel" as articulated in *Stewart*, which focuses on the

barge's *potential* use as a means of transportation on water. The focus, despite Petitioner's claims to the contrary, is *not upon the particular function for which* a vessel is used at a given time, but rather its potential use as a means of transportation on water. Without question, the Gowanus barges are "capable of being used as a means of transportation on water" (*Stewart*, 543 *U.S.* at 495). They have been so used in the past, and would likely be used to transport their generators to different locations again, should the need arise.

The determination that the barges are vessels is consistent with numerous post-*Stewart* cases involving other types of non-traditional watercraft (*see Board of Commissioners of the Orleans Levee District v. M.V. Belle of Orleans*, 535 F.3d 1299 [11th Cir. 2008] [applying *Stewart* definition of vessel to find that a riverboat casino is a vessel]; *Tagliere v. Harrah's Illinois Corp.*, 445 F.3d 1012 [7th Cir. 2006] [injury caused by a defective stool in a riverboat casino that had not been "permanently moored," so as to be the "equivalent of landfill," was an injury caused by a vessel]; *Holmes v. Atl. Sounding Co.*, 437 F.3d 441, 448 [5th Cir. 2006] [applying *Stewart* criteria to hold that a barge used as a floating dormitory to house the crew of a dredge was a vessel]; *Bunch v. Canton Marine Towing Co.*, 419 F.3d 868 [8th Cir. 2005] [analyzing *Stewart* to hold that a cleaning barge attached to a riverbed by poles was a vessel]; *Uzdavines v. Weeks Marine, Inc.*, 418 F.3d 138 [2d Cir. 2005] [bucket dredge was properly classified as a vessel]; *Calcaterra v. City of N.Y.*, 45 A.D.3d 270 [N.Y. App. Div. 2007] [barge used in connection with construction of sewer main held to be a vessel under *Stewart* for purposes of the Jones Act]).

The cases relied upon by Petitioner are clearly distinguishable and thus, have no bearing upon whether certiorari should be granted in this unusual factual situation. The structures at issue in *Howard v. S. Ill. Riverboat Casino Cruises, Inc.* (364 F. 3d 854 [7th Cir. 2004], *cert. denied*, 543 U.S. 942 [2004]), *De La Rosa v. St. Charles Gaming Co., Inc.* (474 F.3d 185 [5th Cir. 2006]), and *Belle of Orleans, supra,* (535 F.3d 1299 [11th Cir. 2008]) were riverboat casinos which were indefinitely moored. None of these cases involved the issue of whether a particular structure was a vessel for purposes of the LHWCA; rather, the issue in *Howard*, as well as in the earlier Fifth Circuit case, *Pavone*, was whether casino employees on indefinitely moored riverboat casinos were "seamen" on "vessels in navigation" for purposes of the Jones Act. Notably, the position taken by Petitioner is actually *adverse* to that of the plaintiffs in such cases as *Pavone* and *Howard*, who would be afforded greater protection under the Jones Act than under the laws of their respective states.

Other cases relied on by Petitioner were decided prior to *Stewart* and likewise involved dissimilar types of structures. Both *Roper v. United States* (368 U.S. 20 [1961]), and *West v. United States* (361 U.S. 118 [1959]), concerned attempts to hold the United States government liable for injuries to persons working for private contractors aboard mothballed "Liberty" ships that had been decommissioned. They relied on the law as it existed prior to the 1972 amendments to the LHWCA and therefore have little precedential value today.

The structure at issue in *Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co.* (271 U.S. 19 [1926]), was a wharf boat that was being used as an extension of a pier. It was essentially a building with an office and quarters for the men in charge; was connected to the land by a driveway; and was lined with concrete eight inches thick. Similarly, the dry-dock at issue in *Cope v. Vallette Dry-Dock Co.* (119 U.S. 625 [1887]) was a structure "contrived for the purpose of taking ships out of the water, in order to repair them, and for no other purpose" (119 U.S. at 627). Finally, in *Kathriner v. UNISEA, Inc.* (975 F.2d 657 [9th Cir. 1992]), the floating fish-processing plant at issue, unlike Gowanus Bay No. 1, did not retain any functional transportation capacity. Rather, like the wharfboat in *Evansville*, it was "designed as a floating factory – merely extending land over water for the purpose of increasing the usable space of a dock-side fish-processing operation," and was not even watertight (*id.* at 660-661). As such, these cases provide no support for granting the Petition.

In sum, given the straightforward, fact-specific application of the *Stewart* criteria by the New York Court of Appeals in determining that Gowanus Bay No. 1 is a "vessel," the state court's holding presents no compelling reason for granting certiorari. Moreover, even if this Court were to conclude that the application of the *Stewart* definition by the Court of Appeals was incorrect, the court's holding would still not provide a compelling reason for granting certiorari, since at most it would represent the misapplication of a properly stated rule of law (*see* Sup. Ct. R. 10). Therefore, the Petition should be denied.

II. CERTIORARI SHOULD NOT BE GRANTED HERE TO RESOLVE A PURPORTED CONFLICT IN THE CIRCUITS AS TO THE VESSEL STATUS OF RIVERBOAT CASINOS

Petitioner attempts to fashion a conflict among the Circuit Courts of Appeals by arguing that a Fifth Circuit case, *De La Rosa v. St. Charles Gaming Co., Inc.* (474 F.3d 185 [5th Cir. 2006]), and a Seventh Circuit case, *Howard v. S. Ill. Riverboat Casino Cruises, Inc.* (364 F.3d 854 [7th Cir. 2004], *cert. denied*, 543 U.S. 942 [2004]), are inconsistent with an Eleventh Circuit case, *Board of Commissioners of Orleans Levee District v. M.V. Belle of Orleans* (535 F.3d 1299 [11th Cir. 2008]). In *De La Rosa*, the Fifth Circuit, after reviewing *Stewart*, held that an indefinitely moored riverboat casino was not a vessel for purposes of admiralty jurisdiction, concluding that the casino's potential use as a means of transportation over water was merely theoretical and not a practical possibility. In *Howard*, similarly, the Seventh Circuit held that employees of a riverboat casino were not seamen on a vessel in navigation for purposes of the Jones Act.

However, in *Belle of Orleans*, the Eleventh Circuit, also relying upon *Stewart*, held that an indefinitely moored, but fully operational, riverboat casino was a "vessel" for purposes of establishing admiralty jurisdiction, even though the owners of the casino had informed the Coast Guard that they intended to operate it in a continuously moored status. The Eleventh Circuit concluded that the owners' apparent intent was not

dispositive of vessel status, since state laws[4] and owners' intentions can change, and jurisdictional rules intended to be uniform should not be subject to such uncertainties (*Belle of Orleans, supra*, 535 F3d at 1311-1312).

Initially, all these cases are distinguishable from the instant case for the simple reason that they involve riverboat casinos, not floating power generating stations. Unlike the Gowanus barges, which serve a maritime purpose in the sense that they can be used to provide electrical power to different shoreside locations as needed, an indefinitely moored riverboat casino serves no maritime purpose. The Fifth Circuit in *De La Rosa* specifically stated that the casino's operations were entirely gaming-related, not maritime in nature (*De La Rosa, supra*, 474 F3d at 187).

To the extent that there is any conflict among the Fifth, Seventh and Eleventh Circuits as to the vessel status of indefinitely or ostensibly permanently moored riverboat casinos, this is not the issue presented here. Petitioner has not, and cannot, point to a conflict between the New York Court of Appeals and any other court, either federal or state, as to whether a floating electrical power generating station is a vessel for purposes of the LHWCA. Moreover, the apparent conflict among the Circuits as to the vessel status of

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4. The Eleventh Circuit noted that initially, Louisiana law required that riverboat casinos, including the Belle of Orleans, be cruising navigable waters when engaged in gaming operations. In 2001, the Louisiana Legislature abolished the cruising requirement and stated that gaming could only occur when a riverboat was dockside (*Belle of Orleans, supra*, 535 F3d at 1303-1304).

riverboat casinos may simply represent a reluctance to extend admiralty jurisdiction to patrons and employees of such gaming-related establishments.

Furthermore, the apparent conflict between *Belle of Orleans* and cases involving issues of a "vessel in navigation" or "seaman" status for purposes of the Jones Act may be illusory. The determination in any such case is necessarily fact specific, depending on the characteristics of the "vessel" and the plaintiff's employment, i.e., whether the plaintiff's connection to a vessel was substantial both in nature and duration, as suggested in *Stewart* (543 U.S. at 494-495).

Finally, the instant case does not present one of the critical factual issues in the riverboat casino cases, since it does not establish whether Astoria/Orion ever stated an intention to "permanently moor" the Gowanus barges, as did the owners of the *Belle of Orleans*. Accordingly, any perceived conflict among the Circuits as to the status of indefinitely moored riverboat casinos is irrelevant and is not a basis for granting certiorari here.

III. SINCE THE PETITIONER'S CLAIM IS CLEARLY SUBJECT TO MARITIME JURISDICTION, THE NEW YORK COURT OF APPEALS CORRECTLY DETERMINED THAT PETITIONER'S STRICT AND VICARIOUS LIABILITY CLAIMS AGAINST ASTORIA/ ORION WERE PREEMPTED

The Claim Satisfies The "Situs" And "Status" Tests For Maritime Jurisdiction

The majority at the Court of Appeals, and the dissenting justice at the Appellate Division, did not reach the issue of whether Petitioner's claims satisfied the "status" test for admiralty jurisdiction, since there was no question that his claim was covered by the LHWCA, and his claim against Astoria/Orion, as the owner of the vessel where he was allegedly injured, was covered by 33 U.S.C. § 905(b).

Even assuming for purposes of argument that, pursuant to *McLaurin v. Noble Drilling (US) Inc.* (529 F.3d 285 [5th Cir. 2008]), the Court of Appeals should first have determined whether Petitioner's claim against the vessel met the "situs" and "status" tests for maritime tort jurisdiction before deciding whether his claim was covered by § 905(b), any omission in this regard is inconsequential, and does not provide a compelling reason for granting certiorari. First, Petitioner's claim satisfies the "situs" test since he was concededly on navigable waters when he was allegedly injured. The claim also satisfies the "status" test, since Petitioner was overhauling a gas turbine on a vessel, and ship repair is

quintessentially a maritime activity. Not only is it one of the activities defining the term "harbor worker" for purposes of the LHWCA (*see* 33 U.S.C. §§ 902(3), 905[b]), but numerous courts have held that repairing or installing machinery on ships represents traditional maritime activity for jurisdictional purposes (*see e.g.*, *Alderman v. Pacific Northern Victor, Inc.*, 95 F.3d 1061, 1064 [11th Cir. 1996] [worker installing an elevator on a ship was engaged in maritime activity even though he alleged that he was merely a "construction worker"]).

In this regard, there is no merit to Petitioner's contention that the barge and the generating equipment it contains should be viewed as separate "structures," any more than specialized machinery aboard different types of watercraft should be viewed as a separate structure. The term "vessel" has been interpreted to include the vessel's fixtures, furniture and other "appurtenances" (*see Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 535 [1995]; *Scott v. Trump Indiana, Inc.*, 337 F.3d 939, 943 [7th Cir. 2003]; *Anderson v. United States*, 317 F.3d 1235, 1237-1238 [11th Cir. 2003]).

Furthermore, in seeking benefits under the LHWCA, Petitioner argued that his work was not "land-based." He also established that his presence aboard the Gowanus barges was neither "transient" nor "fortuitous." At least one court has indicated that this, in itself, may be sufficient to satisfy the "status" test (*see Anaya v. Traylor Brothers, Inc.*, 478 F.3d 251, 254 [5th Cir. 2007] [the presence of a worker injured on the water and who performs a "not insubstantial" amount of his work on navigable waters is neither transient nor fortuitous]).

Finally, as the Court of Appeals properly determined, this case is distinguishable from *Cammon v. City of New York* (95 N.Y.2d 583 [2000], *rearg. denied*, 96 N.Y.2d 793 [2001]), upon which Petitioner relies, inasmuch as *Cammon* involved a claim against a *landowner*, rather than a vessel owner, and did not involve a § 905(b) claim.

The Court Of Appeals Properly Determined That Petitioner's Strict And Vicarious Liability Claims Against Astoria/Orion Were Preempted

In determining that Petitioner's state court claims were preempted, the New York Court of Appeals noted that "the LHWCA clearly states in section 905(b) that an action in negligence may be brought against a vessel and that such remedy 'shall be exclusive of all other remedies against the vessel except remedies available under this chapter'" (Pet. App. 9a, *quoting* 33 U.S.C. § 905[b]). The Court of Appeals also reviewed the congressional intent to find that "actions maintained against a vessel [must] be brought solely within the confines of the LHWCA and nowhere in the Act does it permit strict liability claims, as provided in [New York's Labor Law sections]" (Pet. App. 9a).

Additionally, the Court of Appeals appropriately applied the relevant state and federal case law in concluding that Petitioner's state law claims were explicitly limited by Congress in the LHWCA and were, therefore, preempted (*see e.g., Director, OWCP v. Perini North River Assocs.*, 459 U.S. 297 [1983] [reviewing and analyzing LHWCA and its breadth]; *Emanuel v. Sheridan Transp. Corp.*, 10 A.D.3d 46 (N.Y. App. Div.

2004) [plaintiff precluded from suing employer and limited to negligence claim under § 905 because he was covered under the LHWCA]; *Sutherland v. City of N.Y.*, 266 A.D.2d 373 [N.Y. App. Div. 1999] [§ 240(1) claim preempted by the LHWCA]; *Rigopoulos v. State of N.Y.*, 236 A.D.2d 459 [N.Y. App. Div. 1997] [claims under Labor Law §§ 240(1) and 241(6) preempted by the LHWCA]; *Tibak v. City of New York*, 154 A.D.2d 313 [N.Y. App. Div. 1989], *lv. denied*, 75 N.Y.2d 705 [accident on a pier rehabilitation project where worker was killed when a crane on a barge hit him was governed by general maritime law and the LHWCA]; *Tompkins v. Port of New York Authority*, 217 A.D.2d 269 [N.Y. App. Div. 1996] [substantive federal law rather than state Labor Law applied]).

The exclusivity provisions, and the preemptive sweep of the LHWCA, were clarified by the 1972 amendments to the LHWCA. As this Court explained in *Scindia Steam Nav. Co. v. De Los Santos* (451 U.S. 156 [1981]), one purpose of the 1972 amendments was

> [T]o make the vessel answerable for its own negligence and to terminate its automatic, faultless responsibility for conditions caused by the negligence or other defaults of the stevedore. Cases holding the vessel liable on the ground that it owed nondelegable duties to protect the longshoremen from injury were rejected

(451 U.S. at 168). The 1972 amendments unequivocally state that one of Congress's purposes was to abolish the imposition of strict liability on vessel owners.

Moreover, in *Norfolk Shipbuilding & Drydock Corp. v. Garris* (532 U.S. 811, 818 [2001]), this Court explicitly held that the LHWCA expressly preempts all other claims against vessels and employers. Thus, the Court of Appeals appropriately held that as an employee covered under the LHWCA, Petitioner's claims against Astoria/Orion as the vessel owner were limited to those remedies provided in § 905(b) of the LHWCA.

Petitioner's attempt to avoid preemption by arguing that New York's Labor Law § 240(1) is an action for negligence as that term is used in 33 U.S.C. § 905(b) is without merit. Labor Law § 240(1) imposes absolute and vicarious liability on faultless defendants for the acts of independent contractors, and thus creates something other than a negligence remedy. There can be no doubt of the conflict between the two statutes, thereby warranting preemption. Petitioner's Labor Law § 240(1) claim was properly dismissed as it conflicted with § 905(b) of the LHWCA.

Finally, by holding that 33 U.S.C. § 905(b) expressly preempted Petitioner's state law claims against Astoria/Orion, the Court of Appeals did not have to reach the broader issue of whether the general maritime law impliedly preempts claims under Labor Law §§ 240(1) and 241(6). Accordingly, the instant case does not provide an appropriate setting in which to review that issue, and certiorari should not be granted on that basis.

In the event, however, that this Court decides to grant the Petition, defendants join in the request of Third-Party Defendants-Respondents Elliott Turbomachinery Co., Inc. and Elliott Company that the

Court direct the parties to brief the issue of whether *Cammon v. City of New York* (95 N.Y.2d 583 [2000]) was properly decided.

IV. PETITIONER'S NEGLIGENCE CLAIM WAS DISMISSED ON STATE LAW GROUNDS, AND THE RECORD PROVIDES NO BASIS FOR FINDING A BREACH OF THE "*SCINDIA*" DUTIES

In dismissing Petitioner's Labor Law § 200 (common-law negligence) claim, the motion court held that the record clearly demonstrated that Astoria/Orion did not exercise any supervision or control of the methods or materials of Petitioner's work, and that he only received instruction from his employer Elliott's personnel. The dismissal of the negligence claim was affirmed by the Appellate Division, and tacitly approved by the Court of Appeals, which reinstated the motion court's decision.

Petitioner's attempt to rely on Labor Law §§ 240(1) and 241(6) to state a cause of action in negligence under *Scindia Steam Nav. Co. v. De Los Santos* (451 U.S. 156, 172 [1981]) for violation of § 905(b)'s "active operations" duty and "duty to intervene" is an attempt to do indirectly that which he cannot do directly: assert strict and vicarious liability claims in the guise of a negligence claim against a vessel owner under the LHWCA. Accordingly, Petitioner's arguments in this regard must be rejected. Nor does the Record otherwise establish a basis for finding a breach of the so-called *Scindia* duties: (1) the turnover duty, (2) the active control duty, and

(3) the duty to intervene (*see Emanuel v. Sheridan Transp. Corp.*, 10 A.D.3d 46, 52 [N.Y. App. Div. 2004]; *see also Scindia*, 451 U.S. at 172).

As Petitioner has conceded, the "turnover" duty has no bearing on this case. Nor is there any basis for finding a breach of the "active operations" duty or the "duty to intervene." Petitioner was injured while working on a turbine and was not at risk from hazards in other areas under the barge's control. Inasmuch as it is undisputed that Astoria/Orion exercised no active control over Petitioner's work, which was supervised by his employer Elliott, Petitioner cannot claim that Astoria/Orion breached the "active operations duty."

Similarly, Astoria/Orion did not breach a duty to intervene. The duty to intervene arises when a shipowner is aware that "a condition of the vessel or its equipment poses an unreasonable risk of harm and the stevedore is not exercising reasonable care to protect its employees from that risk" (*Emanuel*, 10 A.D.3d at 52). Petitioner offered no proof that conditions on Gowanus Bay No. 1 created an "unreasonable risk of harm," or that Astoria/Orion was aware of any dangerous conditions. Thus, there was no breach of any duties under *Scindia* as a matter of law.

CONCLUSION

Petitioner has not established any compelling reasons for this Court to grant the Petition. Therefore, the Petition for a writ of certiorari should be denied.

Respectfully submitted,

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